No. 18540

In the

United States Court of Appeals

For the Ninth Circuit

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Appellant,

vs.

RALPH SCHIEWE, BETTE SCHIEWE, his wife, and JANICE NECHANICKY, *Appellees.*

RALPH SCHIEWE and JANICE NECHANICKY,
Cross-Appellants,

vs.

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Cross-Appellee.

Appellant's Reply Brief and Answering Brief on Cross Appeal

Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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DAILY JOURNAL OF COMMERCE

APPELLANT'S REPLY BRIEF

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Appellant's Reply Brief

ARGUMENT

1. From the rule that gross negligence is objectively determined,[1] plaintiffs, in utter disregard of the controlling law, conclude that gross negligence is the same as ordinary negligence and that the jury defines it (Ans Br 13, 23).

The Oregon rule is, however, based on § 500 of the Restatement of Torts:[2]

1. See defendant's opening brief (at 16). Plaintiffs err in asserting (Ans Br 23) that defendant has argued the case "from a subjective standpoint."
2. Three cases are involved, all of which expressly follow § 500 and comment c: *Williamson v. McKenna*, (1960) 223 Or 366 at 373, 391-392, 394-395, 398, 354 P2d 56; *Taylor v. Lawrence*, (1961) 229 Or 259 at 264-265, 366 P2d 735; *Nielsen v. Brown*, (1962) 75 Or Adv Sh 161, — Or —, 374 P2d 896 at 909-910.

> "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."[3]

Comment c states:

> "In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct."

This emphatically does not turn the case into an action for ordinary negligence, nor does it detract from the rule that recklessness is a state of mind. It merely makes necessary allowance for the irrationalities of individuals, but still requires, in every case, circumstances known or apparent to the defendant which create a

3. Counsel therefore errs in asserting (Ans Br 22) that the probability of harm is "the most important consideration" in deciding gross negligence questions. It is only one of the essential elements.

highly probable likelihood of serious injury, and an election to encounter it.

As stated by Justice O'Connell in *Williamson* (223 Or 366 at 389-390):

> "* * * To be sure, if reckless and gross misconduct is defined, not only in terms of the driver's *actual* perception of danger, but in terms of the danger which a reasonable man would perceive (as was recognized in *Turner v. McCready*, supra), our test becomes an objective one and the actor's mental state is not in truth a factor. But even here the test is in terms of a state of mind that may be inferred and this seems to be enough to afford us with a language which can serve as a rally point for judgment. * * *" (emphasis by the Court)[4]

2. It follows that the test is objective only in that the defendant need not subjectively appreciate the extreme risk if it is one any reasonable person would recognize. The case can be submitted only when there is evidence of facts, known or apparent to the defendant, creating an extremely dangerous situation which he elected to encounter. The evidence in this case failed to meet that standard.

a. The gasoline supply in the left tank.

There was no evidence of any facts known or appar-

4. See *Turner v. McCready*, (1950) 190 Or 28 at 54, 222 P2d 1010:
"* * * The element of recklessness may, under some circumstances, be inferred from evidence of the driver's conduct in the light of conditions and of what he *must* have known. * * *" (emphasis added)

ent to the defendant indicating that the left fuel tank was empty, or from which it could be found that he elected to encounter a risk that it might be. Plaintiffs simply ignore the thorough and careful inspection of the plane made by defendant before taking off, during which he made a visual inspection of the fuel supply (App Br 7-8, 10). They ignore the fact that the right tank was ½ full (App Br 10). It is their entire case that defendant may not have actually seen what he thought he saw when he looked in the tank and that he told Mr. Schiewe that the left fuel gauge "always" showed ¾ full.[5] The doubtful evidence of any "custom" at all to use a measuring device (which at most would raise only a question of ordinary care) was manifestly insufficient to create the kind of issue on which their claim must rest.[6]

There was, in short, simply no evidence that defendant ignored facts or dangers known or apparent to him and chose to expose his passengers to them. Under the guest statute, defendant is not the insurer of the gasoline supply, and plaintiffs have cited no authority supporting their claim (essential to their case) that he is.

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5. Note that the asserted defect (if any) was in the gauge, not the tank (Ans Br 13; Tr 22-23, 118).

6. The testimony of plaintiff Ralph Schiewe that one cannot measure the fuel by looking into the hole (Ans Br 13) was contradicted (Tr 226) and was limited by the witness to an examination made with one eye (Tr 46).

b. Defendant's conduct when the engine failed.

Plaintiffs' own testimony established that when the engine failed, defendant, who was frightened and upset, tried to get it going again (App Br 11). As shown before (App Br 27-29; see 19), defendant's conduct in the emergency does not constitute gross negligence under Oregon law. Defendant did not elect a course of danger—he became afraid and at most made a mistake.[7]

Plaintiffs argue that the jury found against defendant and suggest that the failure on takeoff of the plane's only engine was not an emergency (Ans Br 18). They do not refer to any evidence supporting this curious view, which misses the issue. The pilot's training to respond properly to an emergency could conceivably raise a question of ordinary negligence, but can scarcely turn defendant's momentary loss of control into recklessness.[8]

Secondly, plaintiffs erroneously assert that the emergency doctrine is inapplicable if defendant was guilty of prior negligence. This rule[9] is not applicable to gross negligence cases. In *Morris v. Williams*, (1960) 223 Or 50 at 59, 353 P2d 865 the court said:

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7. See defendant's testimony that he lost sight of the horizon and could not tell whether the nose was up or down or where the ground was (Tr 280-281, 293-294, 295).

8. The court erroneously told the jury that the emergency doctrine was not available if defendant was guilty of antecedent negligence. Indeed, the entire instruction on the doctrine related only to a standard of ordinary care, not gross negligence (Tr 326-327).

9. As previously pointed out (App Br 19).

> "* * * If it could be said that defendant may have been guilty of some negligence prior to the moment when he came to the scene of the accident it must be remembered that the charge against him is not that of ordinary negligence but of recklessness and gross negligence. The category of 'Inadvertent conduct, without more, will not constitute recklessness' includes action taken in an emergency. We know of no basis for believing that the defendant, as he drove along, displayed an I-don't-care attitude."[10]

3. Plaintiff's reference (Ans Br 25) to lower court cases from Georgia[11] (which they do not claim have the slightest bearing on their facts)—demonstrates the particular vice of their position. For both cases sustained claims of gross negligence[12] under the rule of Georgia law that the jury, not the court, defines gross negligence and classifies the defendant's conduct as slight, ordinary or gross negligence.[13] As previously pointed out, this is contrary to the controlling Oregon law (App Br 17). In *Burghardt v. Olson*, (1960) 223 Or 155 at 182, 349 P2d 792, 354 P2d 871 O'Connell, J., stated:

> "* * * The temptation here is to leave to the jury the difficult task of drawing a line between ordinary misconduct and reckless conduct. * * * But we are

10. See also 4 Blashfield Cyc Auto Law (1946) 483 (§ 2343) (Acts in emergency not gross negligence)

11. *Sammons v. Webb*, (1952) 86 Ga App 382, 71 SE 2d 832; *Citizens and Southern National Bank v. Huguley*, (1959) 100 Ga App 75, 110 SE 2d 63.

12. *Huguley* was before the court only on the pleadings.

13. *Sammons*, 71 SE 2d 832 at 840, *Huguley*, 110 SE 2d 63 at 67.

> charged with the duty of interpreting the guest statute and of establishing what we conceive to be the minimum amount of fault which can still characterize the conduct as reckless within the meaning of the statute. * * *"[14]

The law, as well as the facts, of the Georgia cases has no bearing on the present problem.

Plaintiffs quote language (Ans Br 14) from *Walthew v. Davis,* (1960) 201 Va 557, 111 SE 2d 784 that slight negligence in an automobile can be gross negligence in an airplane. In *Walthew*, however, the question was whether the Virginia common law rule that an automobile host is liable to his guest only for gross negligence should be applied in airplane cases. The court held that it should not, because airplanes were not included in the Virginia guest statute, and the differences between cars and planes made the automobile rule inapplicable to airplane cases in the absence of specific legislation. The case, therefore, was not concerned with legal gross negligence at all. Indeed, if the court's general reference to "gross" negligence had related to a legal standard of conduct, the case would have been differently decided, because the differences between planes and cars on which it relied would have been legally meaningless under the Virginia common

14. See also *Williamson v. McKenna*, supra, (1960) 223 Or 366 at 392-393, 354 P2d 56.

law rule. "Gross" negligence could then have carried the whole load.[15]

Counsel relies, finally, on cases which, on inspection, turn out to relate only to ordinary negligence (Ans Br 14-15, 19). Two[16] discuss inferences of negligence and *res ipsa loquitur*, neither of which is involved in this case. Two others[17] involved liability for ordinary negligence when a plane stalled or its engine failed. None involved gross negligence or suggested that the conduct there considered amounted to more than ordinary negligence. The failure to distinguish between ordinary negligence and recklessness, and the assumption that there is no difference between them except as the jury may choose to recognize it, is the wholly improper basis on which this case was tried and submitted.

Scarborough v. Aeroservice, Inc., (1952) 155 Neb 749, 53 NW 2d 902, which is relied on by plaintiffs to establish a duty to inspect peculiar to airplanes (Ans Br 13-15), utterly destroys their contention. The case in

15. The same remarks are applicable to plaintiffs' assertion (Ans Br 14, 19) that the standard of ordinary care is higher in airplane cases, for it is the entire range of ordinary negligence, as distinguished from recklessness, which the legislature exempted from liability under the guest statute.

16. *Lange v. Nelson-Ryan Flight Service, Inc.*, (1961) 259 Minn 460, 108 NW 2d 428 was thereafter disapproved by a majority of the Minnesota court, but was applied reluctantly as the law of the case (Minn 1962) 116 NW 2d 266, cert den (1962) 83 S Ct 508. The defendant's duty was that of a carrier to a paying passenger (108 NW 2d 428 at 432). Finally, there was no evidence of engine failure. In *Boise Payette Lumber Co. v. Larsen*, (CA 9 1954) 214 F2d 373 an inference of negligence was permitted, based on the fact that the pilot was not trained for the kind of flying in which he was then engaged.

17. *Robart v. Brehmer*, (1949) 92 Cal App 2d 830, 207 P2d 898; *Grimm v. Gargis*, (Mo 1957) 303 SW 2d 43.

fact related only to ordinary negligence; however, the defendant's duty to inspect was specifically held to be identical with that of an automobile owner. It was not higher, but the same (53 NW 2d 902 at 910; citing cases). The case does not distinguish, but strongly supports the applicability of the automobile guest cases cited by defendant.

4. Unsupported inferences from the record have crept into counsel's presentation.

a. The statement that defendant's insurer "altered" the left fuel tank (Ans Br 10) is less than frank. The investigator came three or four days after the accident and examined and tested the tank, in the course of which a piece was cut from it (Tr 4-5, 215). Counsel's implication of improper conduct is unsupported and improper.

b. Contrary to the suggestion in plaintiffs' brief (Ans Br 11), it nowhere appears that the left fuel line was tested after the accident (see App Br 13). It was established only that gasoline flowed freely from the right tank to the carburetor (see Tr 142-143). This is significant. While there was evidence that gasoline was not reaching the carburetor, the basic question is

whether there was evidence that this happened because the left fuel tank was empty. In this regard, the evidence was uncontradicted that gasoline was still running out of the tank 10-15 minutes after the accident, according to plaintiffs' own witnesses and as counsel admits (Ans Br 9-10).[18]

c. Counsel's attack on the fuel records (Ans Br 8-9) is unconvincing. The entry allegedly "squeezed in" above the 26 gallon gasoline entry for August 12 reads "line flush," which means nothing to this case. There was not the slightest question of the "authenticity" of the record. Counsel asked the gas boy (Fagg) some questions on cross examination and received negative responses (Tr 266-268); he apparently relies on the questions, not the answers, to support his contentions.

Nor were the daily flight records "suspicious". The reference to "Gordon" had nothing to do with this plane.[19] The entry for a 7 hours, 50 minutes flight related to a prior flight to British Columbia (Tr 299), following which 36 gallons were put in the tank on August 10

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18. The testimony of Mr. Withers that it was "possible" he had run the left tank down is not, under Oregon law, substantial evidence that he did so, and the duration of his brief flights is substantial evidence that he did not (Ex 8).

19. Note counsel's reference (Ans Br 8-9):

"* * * which apparently refers to this airplane."

(Tr 266, 299; Ex 8a). Another 26 gallons were put in on the 12th, filling both tanks (Tr 266, 268).

d. Contrary to counsel's assertion (Ans Br 16), defendant did not "admit" he was at the controls and was flying the plane (Tr 292).

CONCLUSION

The evidence simply did not approach the minimum proof of gross negligence under Oregon law. There was no evidence that defendant's inspection of the fuel tank was substandard, or that he had actual or apparent knowledge of facts indicating that the fuel supply was or might be inadequate. In any case, the evidence was conclusive that there was gasoline in both tanks.

If defendant made a mistake when the engine quit, according to the undisputed evidence, he did so in the course of attempting to meet the emergency which arose when the engine failed and he lost sight of the horizon. There was no evidence in either case that he chose to expose his passengers to any risk. As stated by Goodwin, J., in *Bland v. Williams*, (1960) 225 Or 193 at 199, 357 P2d 258:

> "The rule in *Williamson v. McKenna* precludes holding that there was evidence of recklessness when there was merely evidence of negligence. * * *"

The judgment should be reversed and judgment entered in favor of defendant.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH & DEZENDORF

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CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney

ANSWERING BRIEF ON CROSS APPEAL

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JURISDICTION

Defendant and cross-appellee Anton J. Steinbock adopts his prior jurisdictional statement (App Br 1-2).

STATEMENT OF THE CASE

Defendant adopts his prior statement of the case (App Br 2-4) as supplemented herein

Ralph Schiewe

Mr. Schiewe returned to work full time as a radio operator on November 1 (Tr 34, 37) and has worked steadily since then (Tr 52). He resumed his regular job

as a mechanic on April 1 (Tr 34, 39) and has received wage increases (Tr 59-60). He was on Navy pay while he was away from his job (Tr 52) and received vacation time and sick leave (Tr 52). Most of his medical expenses were paid by the Navy (Tr 35; Ans Br 30).

While he complained at the trial of continuing pain (Tr 39-42; see Tr 162), he admitted that he had recently taken a Navy cruise (Tr 53) and maintains a large yard (Tr 59). The body cast, mentioned by counsel, was uncomfortable, but gave him "no real difficulty" (Tr 35).

His complaints of continuing back pain are subjective (Tr 175), and his discomfort, if any, is not in the injured part of his back (Tr 163). The lumbosacral spine, where he located the pain, is normal (Tr 167, 168). Dr. Engelcke found no muscle spasms, and reflexes are normal; there is no nerve involvement (Tr 164-165). He has a normal range of motion (Tr 168, 174), and even his subjective symptoms are "very mild" (Tr 169). He made an "excellent" recovery (Tr 169).

Janice Nechanicky

Miss Nechanicky also recovered completely. While she complained of pain to Dr. Engelcke (Tr 188; see Tr 125-126), he testified that her disability is in fact "minimal" and her complaints may disappear (Tr 190). He found a single slight compression (Tr 189) and, con-

trary to counsel's statement (Ans Br 31), there is no other break or compression whatever (Tr 191). There is no muscle spasm (Tr 189). Her disability, if any, is "very slight" (Tr 192).

She, too, had no particular trouble with the body cast (Tr 122). She was away from work for one month, and for two weeks thereafter worked two hours each day (Tr 123). Since then, she has worked full time, except when she is unemployed (Tr 124, 127).

QUESTION PRESENTED

Is there support in the record for the decision of the trial judge?

SUMMARY OF ARGUMENT

1. Cross-appellants (hereafter called plaintiffs) were adequately compensated for their injuries, which were sought to be magnified at the trial.

2. The record supported the decision of the trial judge, which is therefore conclusive. Plaintiffs do not assert legal error or even charge that the trial judge's ruling constituted an abuse of discretion. The ambiguous, subjective and conflicting evidence was carefully considered by the trial judge before he decided the motion. His decision was proper and final.

3. A retrial could not be limited to the issue of damages.

ARGUMENT

1. The record compelled the trial judge to deny the motion of plaintiffs and fully supports his decision.

a. In their motion and in this Court, plaintiffs claim only that the sums awarded them by the jury were inadequate. They do not claim that the jury awards were the result of passion or prejudice or that there was any misconduct of counsel, jurors or witnesses. No complaint is made of the instructions on damages or that the trial judge did not perform his job dispassionately and fairly.[20] Nowhere do they assert that the denial of their motion amounted to an abuse of discretion.

b. In attempting to build up their injuries, counsel relies almost exclusively upon plaintiffs' testimony and that of their own examining and treating doctors, none of which was binding on the jury and, as pointed out by the trial judge, was subject to "considerable difference of opinion between the doctors" (Tr 355).

c. The jury considered each claim separately and brought back a distinct verdict for each plaintiff. Mrs. Schiewe's award was apparently considered adequate.

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20. The judge was of the view that plaintiff Ralph Schiewe was guilty of contributory negligence as a matter of law (Tr 354); there is, however, no indication that this ruling affected his decision on the motion.

d. The trial judge gave careful attention to plaintiffs' motion before exercising his discretion. He expressed no dissatisfaction with the amount of the verdicts, and the grounds of his decision are not criticized in any way.[21]

> "* * * There was a considerable difference of opinion between the doctors on the injuries, particularly to Ralph Schiewe and Miss Nechanicky, and particularly the attending doctor, who was called by the defendant, and said that they had a very good result. The evidence shows that they were back at work within a very short period of time and earning, you might say, the same wages as they were earning before, and they have so continued to earn such wages.
>
> "Under those circumstances I believe that the trier of the facts could have arrived at these figures which were inserted in the verdicts by the jury. I am not going to set the verdicts aside.
>
> "The motion for a new trial is denied." (Tr 355-356)

e. Considering the evidence referred to by counsel and that which he has ignored, the jury could conclude that there was a deliberate effort by these plaintiffs to magnify their injuries at the trial. It was fully entitled to disbelieve their subjective complaints, as well as the enthusiastic testimony of their doctors. While the acci-

21. Plaintiffs nowhere claim that the trial judge's decision was an abuse of his discretion. They incorrectly treat the case as one in which this Court can review the amount of the jury's verdicts.

dent probably caused them discomfort and inconvenience, their injuries in fact healed quickly, and they sustained little loss; both made excellent recoveries and now lead normal lives. Both were awarded sums substantially in excess of their claims for special damages, in amounts which the jury, which saw them and heard them testify, considered adequate compensation for their slight residual difficulty (if any) and their discomfort. The evaluation of the evidence was exclusively the function of the jury, subject only to the trial judge's discretionary authority to review the verdicts. Both decisions were properly adverse to plaintiffs' claim for large damages.

2. This Court's review of the trial judge's denial of the motion is limited to legal error, and plaintiffs assert none. If, as here, the trial judge's decision is supported in the record, it is final and cannot be set aside.

In *Neese v. Southern Railway Co.*, (1955) 350 US 77, 76 S Ct 131, 100 L Ed 60 the Supreme Court reversed a judgment of the Fourth Circuit which ordered a new trial after the trial court refused to grant one for excessive damages. The Supreme Court said:

> "* * * as we view the evidence we think that the action of the trial court was *not without support in the record, and accordingly* that its action should not have been disturbed by the Court of Appeals." (emphasis supplied)

In *Southern Pac. Co. v. Guthrie*, (CA 9 1951) 186 F2d 926 at 932, cert den (1951) 341 US 904 this Court held that the trial court's refusal to allow a new trial for excessive or inadequate damages is limited to cases where (1) there is collateral legal error (none is charged in this case); or (2) the verdict is so "monstrous" or "grossly excessive" as to require reversal of the lower court's ruling for abuse of discretion. The discretion, however, is exclusively that of the trial judge.

> "When the trial court is presented with a motion for a new trial grounded on a claim of an excessive verdict its power to deal with the motion is not limited to questions of law. The same power and duty which the trial judge has to set aside any verdict and grant a new trial when he is of the opinion the verdict is against the weight of evidence, is that which the trial court frequently exercises in ordering a new trial, or in conditioning denial of a new trial on a remittitur because, in the opinion of the court, the amount of the verdict is against the weight of the evidence. But this power and duty belongs exclusively to the trial judge. It is not for us to give directions in such a case, even although he may have declined to take action, such as we consider we would have done had we been in his place. * * *" (at 932-933)[22]

22. See also *Bradley Min. Co. v. Boice*, (CA 9 1951) 194 F2d 80 at 83; *Siebrand v. Gossnell*. (CA 9 1956) 234 F2d 81 at 94. This Court has previously applied the "abuse of discretion" rule. *Cobb v. Lepisto*, (CCA 9 1925) 6 F2d 128 at 130 (contract case); *Department of Water (etc.) v. Anderson*, (CCA 9 1938) 95 F2d 577 at 586 (personal injury case; rule recognized). Whether any review of the trial judge's ruling is permissible, especially since *Neese*, is still in doubt. See *Dagnello v. Long Island Rail Road Company*, (CA 2 1961) 289 F2d 797 at 801-802.

On the present record, the trial judge had little choice. The jury's awards, while small, adequately recognized and translated all of the elements of loss into dollar figures and expressed their findings based on the evidence. In *Veelik v. Atchison, Topeka & Santa Fe Railway Company*, (CA 9 1955) 225 F2d 53 at 54 ($2,000 verdict for injured railway employee) this Court said:

> "* * * While a much higher verdict might have been justified on the evidence if the triers of fact had chosen to return a greater amount, there was no basis for granting a new trial or setting aside the award which was made. * * *"

In *Veelik*, as here, the evidence was largely subjective, and permanent disability was not established; nor were there circumstances indicating passion or prejudice of the jury.

> "Many of the devices suggested by advocates of the 'adequate recovery' were attempted in the trial of this case. But the jury must be trusted in the absence of legal error. If the courts are to uphold some of the large verdicts which are returned, these tribunals should also respect their findings when they choose to be moderate." (at 55)

In *Arramone v. Prowse*, (CA 9 1956) 235 F2d 454

at 455 ($6,000 verdict for badly scarred face) Judge Healy said:

> "* * * We can only assume that the verdict represents an honest and conscientious appraisal by the jurors of the amount fairly to be awarded as general compensation. Our power to interfere with the court's denial of a new trial is in any event very limited. Certainly we cannot say that its order in this respect constituted an abuse of discretion, or that it amounted to an error of law."

In *Bainbrich v. Hammond Iron Works*, (CA 10 1957) 249 F2d 348 at 349-350 the court said:

> "* * * The record here discloses that the case was tried in a fair and dispassionate manner, and there is no indication whatsoever that the jury was influenced by passion, prejudice or by any other unlawful cause. It is said that the undisputed evidence as to the extent of the injuries to the plaintiffs, permanent and otherwise, was such as to indicate that the verdict was palpably and grossly inadequate. This question, we think, was one of fact, to be determined by the trial court within its discretion, and is not reviewable here. * * *"[23]

There are, in addition, specific circumstances in this case which preclude review:

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23. See also *Cross v. Thompson*, (CA 6 1962) 298 F2d 186; *Bryant v. Mathis*, (CA DC 1960) 278 F2d 19; *DeFoe v. Duhl*, (CA 4 1961) 286 F2d 205 (concussion and related injuries; special damages of $624.30, verdict $699); *Gorman v. Nelson*, (CA 5 1959) 263 F2d 116 (alleged "multiple and serious injuries"; special damages $570, verdict $1,000); Anno: 16 ALR 2d 393 (1951).

a. The jury was not bound by the testimony of plaintiffs or their doctors, and the extent and value of plaintiffs' claimed pain and suffering are entirely for the jury. *Springer v. J. J. Newberry Co.*, (DC Pa 1951) 94 F Supp 905, aff'd (CA 3 1951) 191 F2d 915 (fractured wrist causing 45% permanent disability; $750 verdict affirmed).

b. As the trial judge pointed out, the evidence of plaintiffs' injuries was conflicting. This conflict supports its decision and precludes review. *Friedman v. Phillips*, (CA DC 1961) 287 F2d 349; *Dadiskos v. Shorey*, (CA 2 1956) 229 F2d 163 at 164.

c. The trial judge gave careful consideration to plaintiffs' motion for a new trial. In *Lebeck v. William A. Jarvis, Inc.*, (CA 3 1957) 250 F2d 285 at 288 the court said:

> "* * * Nothing appears or has been suggested to indicate that in so ruling the court acted arbitrarily. Rather it seems clear that, weighing considerations pro and con, the trial judge exercised his best judgment as to the possible size of a rational verdict in the light of all of the evidence. And that is the extent of our concern as a reviewing court. For our inquiry goes only to the question whether the trial court has exercised discretion in a judicial manner in disposing of this aspect of the motion for a new trial. * * * Beyond that, it is not our privilege to substitute our judgment for that of the trial court as to the maximum amount which will provide fair recompense for injuries which cannot be equated

in any mathematical way with any number of dollars. * * *"

3. The alternative motion of plaintiffs in the trial court was for a new trial limited to damages or for a new trial of all issues, including liability (R 34). Since the motion was denied, the question of the issues which might be retried was not decided below. In *Grimm v. California Spray-Chemical Corp.*, (CA 9 1959) 264 F2d 145 at 146 this Court affirmed an order for a retrial of issues of both liability and damages in a case where the verdict was for less than the special damages alone. This Court held that "a retrial of the damage issue alone would be grossly unfair" to the defendant.

It cannot be assumed that the jury was wholly satisfied with plaintiffs' proof of liability. The issues may not be independent, and a retrial therefore could not be limited to the issue of damages.[24]

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24. *Haug v. Grimm*, (CA 8 1958) 251 F2d 523 at 527-528; *Southern Railway Company v. Madden*, (CA 4 1955) 224 F2d 320 at 321; *Southern Railway Company v. Madden*, (CA 4 1956)) 235 F2d 198 at 204; *Schuerholz v. Roach*, (CCA 4 1932) 58 F2d 32 at 33-34, cert den (1932) 287 US 623; *Mutual Ben. Health & Accident Ass'n v. Thomas*, (CCA 8 1941) 123 F2d 353 at 356; Anno: 85 ALR 2d 9 at 26-34 (1962).

CONCLUSION

The jury adequately compensated Ralph Schiewe and Janice Nechanicky for their injuries, and the cross appeal is without merit.

Respectfully submitted,

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JOHN GORDON GEARIN

JAMES H. CLARKE

Attorneys for Defendant and Cross-Appellee Anton J. Steinbock

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney